IN THE
MISSOURI SUPREME COURT

STATE OF MISSOURI,	)	
	)	
Respondent,	)	
	)	
vs.	)	No. SC87535
	)	
SCOTT BAXTER,	)	
	)	
Appellant.	)	

APPEAL TO THE MISSOURI SUPREME COURT
FROM THE CIRCUIT COURT OF DADE COUNTY, MISSOURI
TWENTY-EIGHTH JUDICIAL CIRCUIT
THE HONORABLE JAMES R. BICKEL, JUDGE

APPELLANT'S SUBSTITUTE BRIEF

Ellen H. Flottman, MOBar #34664
Attorney for Appellant
3402 Buttonwood
Columbia, Missouri 65201-3724
Telephone (573) 882-9855
FAX (573) 875-2594
E-mail: Ellen.Flottman@mspd.mo.gov

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JURISDICTIONAL STATEMENT

Appellant was convicted after a jury-waived trial in the Circuit Court of Dade County, of arson in the second degree, Section 569.050,[1] and assault in the third degree, Section 565.070, by the Honorable James R. Bickel.[2] Judge Bickel sentenced appellant to six years on Count I and a concurrent term of fifteen days on Count II. The Missouri Court of Appeals, Southern District, reversed appellant's conviction and remanded for a new trial. This Court took transfer of this cause on application of the respondent, and therefore has jurisdiction pursuant to Rule 83.04. Article V, Section 9, Mo. Const. (as amended 1976).

[1] Statutory citations are to RSMo 2000.

[2] Appellant challenges his jury waiver.

STATEMENT OF FACTS

Appellant was charged by amended information filed May 27, 2004, in the Circuit Court of Dade County, with arson in the second degree and assault in the third degree (L.F. 13-14, Tr. 5).[3] The parties appeared before the Honorable James R. Bickel for trial, and made the following record.

MS. STEMMONS [prosecutor]: Okay, Your Honor, one other preliminary matter for the record: The agreement in this case was that Mr. Baxter would waive a jury trial and have a bench trial, upon my reduction of the charge to a class C felony, arson in the second degree. I would ask that Mr. Baxter acknowledge that on the record, so he cannot later complain that he did not have a jury trial.

THE COURT: All right, Mr. Hammond, on behalf of the defense, I do understand that there is a waiver of jury trial.

MR. HAMMOND [defense counsel]: Yes, Your Honor.

THE COURT: All right, thank you.

(Tr. 6). No further record was made. The following evidence was presented to Judge Bickel.

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[3] The record consists of a trial transcript (Tr.), a suppression hearing transcript (Supp. Tr.), a sentencing transcript (S.Tr.), a second sentencing transcript (2S.Tr.), a legal file from the appeal in SD 26464 (L.F.), a legal file from the appeal in SD 26808 (2L.F.), and a supplemental legal file (Supp. L.F.).

Ed and Heather Scharbach owned an apartment building at 309 West Water Street in Greenfield, Missouri (Tr. 12). Apartment 3 was rented to Shawn Carerra, and Melinda Bennett lived there with him (Tr. 14). On September 29, 2002, the apartment building sustained fire damage in an amount exceeding $16,000 (Tr. 14-15).

John Matney, a fire investigator, determined that the fire had started in a mattress in Apartment 3 (Tr. 16-22). According to Mr. Matney, the fire was not an accident, but had to have been started by an external heat source like a lighter or a match (Tr. 22-23). There was also a second point of origin, in a cardboard box in the corner of the room (Tr. 24). Mr. Matney did not find any accelerants (Tr. 30).

On September 29, Melinda Bennett went to the lake with her mother (Tr. 35-37). She returned late that afternoon, and saw a friend of hers, Brittany Tucker, who flagged down Melinda's vehicle (Tr. 37).[4] Brittany was upset and shaking; she said Melinda needed to go to her apartment because Brittany had knocked on the door and there was smoke coming out (Tr. 37-38).

Melinda went around to the stairs leading to her apartment, and saw smoke (Tr. 40). The family who lived upstairs from Melinda, the Anayas, were in the parking lot trying to telephone the police (Tr. 40-41). Melinda had seen Deputy

[4] Melinda and Brittany both had a sexual relationship with appellant, but according to Melinda, "they were all friends" (Tr. 39).

Max Huffman in the town square, so she ran and told him her apartment was on fire (Tr. 41, 54). Deputy Huffman called the fire department (Tr. 41, 54).

Deputy Huffman went upstairs to the apartment (Tr. 54). He opened the door, and saw heavy smoke and flame rolling out, so he closed the door and went downstairs to start clearing the other apartments (Tr. 54-55).

Melinda remained on the square (Tr. 42). Ten or fifteen minutes later, appellant approached her (Tr. 42). They talked for a while, then appellant put a little pocket knife to Melinda's throat and said if he had wanted her dead, he would have already killed her (Tr. 42). Melinda testified it kind of scared her; she did not know what he was talking about (Tr. 42). She reported the threat to Chris Blunt or Gary Gabbert of the Sheriff's Department (Tr. 46).

Deputy Blunt called Deputy Huffman on his radio and told him what Melinda said (Tr. 58). Deputy Huffman went to look for appellant (Tr. 58). He saw him about 10:30, standing in the parking lot of the Sheriff's Department with Brittany (Tr. 59). Deputy Huffman called for backup, and Deputy Brooks responded (Tr. 59).

Deputy Huffman asked appellant to step over to the car (Tr. 60). He asked appellant if he had any weapons, and appellant put his hand in his pocket (Tr. 60). Concerned for their safety, the two deputies took hold of appellant and laid him over the hood of the patrol car (Tr. 60). They patted him down and found two knives (Tr. 60). Appellant was arrested for assault on Melinda (Tr. 61). He had

black sooty substance on his pants and feet (Tr. 64). He was later charged with arson of the apartment building (Tr. 66).

The next day, appellant told the dispatcher he wanted to speak to the sheriff (Tr. 66). Appellant was read his rights under ***Miranda***.[5] The sheriff asked appellant if he went into the apartment, and he said, "f*** no" (Tr. 67). The sheriff asked him why people said he was, and appellant replied, "I might have knocked on the door" (Tr. 67-68). When the sheriff asked if the door was locked, appellant said "yeah, but you can open it with a card" (Tr. 68).

Brittany testified against appellant (Tr. 76). She said that appellant thought that Melinda had "snitched" on him to the authorities about some robberies (Tr. 81). Brittany went to appellant's house the afternoon of the fire (Tr. 82). They drank some whiskey and took some Clonapams that he stole from his brother (Tr. 82-84). Then they went to Melinda's to get her to party with them (Tr. 85).

Brittany knocked on the apartment door, and there was no answer, so they walked in (Tr. 87). There was an air mattress bed on the floor of the apartment across from the kitchen (Tr. 89-90). Brittany looked in the refrigerator and took a "ring pop" (Tr. 90). She looked over, and the bed was on fire (Tr. 90). According to Brittany, appellant was standing next to the bed with a Bic lighter in his hand (Tr. 91). Brittany ran out and appellant followed her (Tr. 91-92). Then Brittany saw Melinda driving up, and ran and flagged her down (Tr. 94-95).

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[5] ***Miranda v. Arizona***, 384 U.S. 436 (1966).

Brittany made a deal to testify (Tr. 102). She will not be prosecuted for any crimes arising from this incident (Tr. 113). She wrote letters to appellant in jail saying that her testimony was a lie and she was coerced by the police (Tr. 111-112). Melinda believes that Brittany stole jewelry from her apartment the night of the fire (Tr. 47-48). According to Melinda, Brittany admitted that to her (Tr. 48). Brittany initially denied being in the apartment to Deputy Blunt, who took her statement (Tr. 133-134). Deputy Blunt testified that Brittany "went round and around lying for about ten minutes" (Tr. 134).

Judge Bickel found appellant guilty (Tr. 153). He sentenced appellant to six years for arson, and after remand by the Court of Appeals, to a concurrent sentence of fifteen days for assault (S.Tr. 1, 10, 2S.Tr. 1, 4-5, L.F. 28, Supp. L.F. 1-3). Appellant appealed to the Southern District Court of Appeals (L.F. 32, 2L.F. 10).

The Court of Appeals reversed appellant's convictions and remanded for a new trial. ***State v. Baxter***, No. SD 26808 (Mo. App., S.D., filed January 26, 2006). The Court agreed with appellant that the trial court committed plain error in that there was "absolutely no basis in the record to determine 'with unmistakable clarity' that Appellant had knowingly, intelligently and voluntarily waived his fundamental right to trial by jury, because he did not sign a written waiver nor was he personally examined by the trial court." Slip op. at 1-2. This Court transferred this appeal on respondent's application.

POINT RELIED ON

The trial court plainly erred when it proceeded to trial without a jury without ascertaining that appellant's waiver was voluntarily and knowingly entered, because such action violated his rights to due process and trial by jury as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution, Article I, §§ 10, 18(a) and 22(a) of the Missouri Constitution, and Rule 27.01, in that there is absolutely no basis in the record to determine "with unmistakable clarity" that appellant knowingly, intelligently and voluntarily waived his fundamental right to trial by jury, resulting in a manifest injustice, since appellant did not sign a written waiver nor was he examined by the trial court personally.

State v. Hatton, 918 S.W.2d 790 (Mo. banc 1996);

Johnson v. Zerbst, 304 U.S. 458 (1938);

Miller v. Dormire, 310 F.3d 600 (8th Cir. 2002);

Rose v. Clark, 478 U.S. 570 (1986);

U.S. Const., Amends. VI and XIV;

Mo. Const., Art. I, §§ 10, 18(a) and 22(a); and

Rules 27.01, 29.12 and 30.20.

ARGUMENT

The trial court plainly erred when it proceeded to trial without a jury without ascertaining that appellant's waiver was voluntarily and knowingly entered, because such action violated his rights to due process and trial by jury as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution, Article I, §§ 10, 18(a) and 22(a) of the Missouri Constitution, and Rule 27.01, in that there is absolutely no basis in the record to determine "with unmistakable clarity" that appellant knowingly, intelligently and voluntarily waived his fundamental right to trial by jury, resulting in a manifest injustice, since appellant did not sign a written waiver nor was he examined by the trial court personally.

Standard of review: the issue presented

Appellant made no objection at trial to being tried by the court, nor did he file a motion for new trial. Review is for plain error. This is the issue before this Court. As the Southern District recognized in its opinion, this case presents the issue left undecided by this Court in ***State v. Hatton***, 918 S.W.2d 790 (Mo. banc 1996):

> whether a defendant must be granted plain error relief, when (1) defendant's counsel waives the right to a jury trial on defendant's behalf in open court; (2) defendant is not examined by the trial court regarding his understanding of that right; (3) defendant does not object to proceeding to

trial before a judge; but (4) defendant denies any involvement in the conduct on which the charges are based.

State v. Baxter, No. SD 26808 (Mo. App., S.D., filed January 26, 2006), slip op. at 7. Appellant requests plain error review under Rules 29.12(b) and 30.20. Plain error review requires a finding that manifest injustice or miscarriage of justice has resulted from the trial court error. ***State v. Forrest***, 183 S.W.3d 218, 229-230 (Mo. banc 2006). The trial court's failure to discern in open court whether appellant knowingly, intelligently and voluntarily waived his fundamental right to a jury trial violate appellant's rights to due process and a trial by jury, as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution, Article I, Sections 10, 18(a) and 22(a) of the Missouri Constitution, and Rule 27.01.

Facts

The parties appeared before the Honorable James R. Bickel for trial, and made the following record.

MS. STEMMONS [prosecutor]: Okay, Your Honor, one other preliminary matter for the record: The agreement in this case was that Mr. Baxter would waive a jury trial and have a bench trial, upon my reduction of the charge to a class C felony, arson in the second degree. I would ask that Mr. Baxter acknowledge that on the record, so he cannot later complain that he did not have a jury trial.

THE COURT: All right, Mr. Hammond, on behalf of the defense, I do understand that there is a waiver of jury trial.

MR. HAMMOND [defense counsel]: Yes, Your Honor.

THE COURT: All right, thank you.

(Tr. 6). No further record was made. No written waiver appears of record.

This was error

A criminal defendant enjoys the fundamental right to be tried by a jury. U.S. Const., Amends. VI and XIV; Mo. Const., Art. I, §§ 18(a) and 22(a). Rule 27.01 provides that all issues of fact in any criminal case shall be tried by a jury unless trial by jury is waived as provided in that rule. Rule 27.01(a). Rule 27.01(b) provides that a defendant may, with the assent of the court, waive a jury trial. But, in all felony cases such waiver by the defendant "shall be made in open court and entered of record." Rule 27.01(b). *Also see*, Mo. Const., Art. I, § 22(a) (in every criminal case any defendant may, with the assent of the court, waive a jury trial and submit the trial of such case to the court).

Our system of justice views waivers such as the waiver at bar with skepticism. ***Glasser v. United States***, 315 U.S. 60, 70 (1942). "To preserve the protection of the Bill of Rights for hard-pressed defendants, we indulge in every reasonable presumption against the waiver of fundamental rights." ***Id.*** A waiver must be an intentional relinquishment or abandonment of a known right or privilege. ***Johnson v. Zerbst***, 304 U.S. 458, 464 (1938). Any such waiver of a

jury trial must be voluntarily, knowingly and intelligently made. ***State v. Sharp,*** 533 S.W.2d 601 (Mo. banc 1976); *see also,* ***Miller v. Dormire,*** 310 F.3d 600, 604 (8th Cir. 2002).

The trial judge bears a "serious and weighty responsibility" to safeguard against an unknowing, unintelligent and unintentional waiver of a jury trial. ***Johnson v. Zerbst***, 304 U.S. at 465. Courts may not "presume acquiescence in the loss of fundamental rights." ***Id.*** at 464 (citation omitted).

Rule 27.01(b) also provides that a waiver of jury and an assent of the court to the waiver must appear in the record "with unmistakable clarity." ***State v. Bibb***, 702 S.W.2d 462, 467 (Mo. banc 1985). "Logically, the purpose of the rule is to ensure that the defendant's waiver is not allowed until the trial court is satisfied that the waiver is knowingly, voluntarily and intelligently made." ***Luster v. State,*** 10 S.W.3d 205, 211 (Mo. App., W.D. 2000). Defendants "should be informed that (1) twelve members of the community compose a jury; (2) the defendant may take part in jury selections; (3) jury verdicts must be unanimous; and (4) the court alone decides guilt or innocence if the defendant waives a jury trial." ***United States v. Robertson***, 45 F.3d 1423, 1432 (10th Cir. 1995) [citations omitted].

Was it PLAIN error?

"Plain error review is intended to correct only evident, obvious and clear error that resulted in manifest injustice or miscarriage of justice. ***State v.***

Ramirez, 143 S.W.3d 671, 676 (Mo. App., W.D. 2004) (citation omitted). This error is evident and obvious from the face of the record: the trial court failed to follow the mandate of Rule 27.01 that the waiver be made in open court and on the record; and failed to ascertain that appellant's waiver was knowingly, voluntarily and intelligently made. The question remains whether that error resulted in a manifest injustice.

In ***Ramirez***, the Western District found that there was no plain error, in part because there was no Rule 27.01 violation. The trial court in that case examined the defendant who agreed personally that he wanted the judge to decide the case, "not a jury." 143 S.W.3d at 671.

However, in other cases, the Courts of Appeals have consistently held that where there is no examination of the defendant personally on the record regarding his waiver of a jury, plain error results. A fundamental constitutional right such as the right to trial by jury cannot be waived unless that waiver is knowing, intelligent and voluntary. ***Johnson v. Zerbst***, 304 U.S. at 464. How can the trial court ascertain that the waiver is knowing and voluntary without personally examining the defendant, such as is required for waiver of counsel[6] or waiver of trial[7] altogether upon a plea of guilty? The standard in all of these situations is the same. The trial court must satisfy itself that the waiver of the defendant's

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[6] ***Faretta v. California***, 422 U.S. 806, 835 (1975).

[7] ***Parke v. Raley,*** 506 U.S. 20, 28-29 (1992).

constitutional rights is knowing and voluntary. ***Godinez v. Moran*** 509 U.S. 389, 400 (1993).

In ***State v. Mitchell***, 145 S.W.3d 21 (Mo. App., S.D. 2004), the Southern District found that the failure to ascertain on the record that the defendant's waiver of jury was knowing and voluntary was plain error. The Court relied on its earlier decision of ***State v. Rulo***, 976 S.W.2d 650 (Mo. App., S.D. 1998), for the proposition that denying the claim of error would the "the equivalent of totally ignoring Rule 27.01(b)." ***Rulo***, 976 at 653. See also, ***State v. Cooper***, 108 S.W.3d 101, 106 (Mo. App., E.D. 2003) ("since a court may not presume acquiescence from a defendant's silence, there is absolutely no basis in the record to determine that defendant had knowingly, intelligently, and voluntarily waived his right to trial by jury, resulting in a manifest injustice.")

In ***Miller v. Dormire***, ***supra***, Miller claimed in his Rule 29.15 motion that he was not apprised of his right to jury trial, although counsel announced the waiver in Miller's presence in open court. The Missouri Court of Appeals, Eastern District, found that counsel's announcement of waiver in Miller's presence was sufficient evidence of a knowing and voluntary waiver, and that any error by counsel in failing to adequately advise Miller was harmless error. 310 F.3d at 604-605. The Eighth Circuit affirmed the district court's determination that the state appellate court's finding on the issue of the validity of the waiver was "an unreasonable determination of the facts and an unreasonable determination of the federal law." ***Id***. The Court also rejected the State's

argument that harmless error analysis applied "When a defendant is deprived of his right to trial by jury, the error is structural and requires automatic reversal of the defendant's conviction." ***Miller***, 310 F.3d at 604.

Was there a manifest injustice?

The State's transfer application argues that appellant cannot meet the standard of manifest injustice where he cannot show that the error was "outcome determinative." Appellant asserts that this is not the standard for the complete denial of a constitutional right without a knowing and voluntary waiver, appearing on the record with unmistakable clarity. Where the right to a jury "is altogether denied, the State cannot contend that the deprivation was harmless because the evidence established the defendant's guilt; the error in such a case is that the wrong entity judged the defendant guilty." ***Rose v. Clark***, 478 U.S. 570, 578 (1986).[8]

This Court last examined this issue in ***Hatton***, 918 S.W.2d 790. In ***Hatton***, the defendant's attorney informed the court that the defendant was "waiving jury."

[8] Even the case relied on by the state, ***Ramirez***, does not apply an "outcome determinative" test to this type of claim. In that case, the Western District expressly rejudicated that requirement when dealing with a claim that the "defendant's right to trial by jury has … been altogether denied." 143 S.W.3d at 676 (citation omitted).

Id. at 795. On appeal, he argued, as here, that the trial court should have assured that his waiver was voluntary and knowing. ***Id.*** This Court found that there was no plain error, however, because the defendant admitted to the crime for which he was convicted. ***Id.*** This Court did not decline plain error review, as the state seems to urge in its transfer application, but simply found no miscarriage of justice. Under the facts of that case, where there were completely stipulated facts and the case was submitted to the trial court on a legal issue only, appellant would agree. ***See also***, ***State v. Seibert***, 103 S.W.3d 295 (Mo. App., S.D. 2003) (defendant testified in a prior trial to the facts establishing his guilt of the charged offenses).

Here, by contrast, appellant did not admit to either of the charged offenses. This was far from an overwhelming case. The only evidence that the arson was committed by appellant was the testimony of Brittany; Brittany, who lied to the police (Tr. 134), stole Melinda's jewelry from her apartment the afternoon of the fire (Tr. 47-48), wrote to appellant in jail telling him she knew he was not guilty (Tr. 111-112), and who made a deal for her testimony so that she would not be prosecuted (Tr. 102, 113). While the state calls it "speculative" to consider that a jury might not have believed Brittany's testimony, appellant does not have to establish that he would have been acquitted by a jury. This error is not subject to review for harmless error, but for manifest injustice. ***Rose v. Clark***, 478 U.S. at 578; ***Miller v. Dormire***, 310 F.3d at 604. Under this Court's opinion in ***Hatton***, appellant has established that manifest injustice has resulted.

The failure to ascertain with unmistakable clarity, in open court and on the record, that appellant knowingly, intelligently, and voluntarily waived his right to a jury trial resulted in a manifest injustice. Rules 27.01(b), 29.12(b) and 30.20. The record does not disclose with "unmistakable clarity" anywhere that he ever had an understanding of the ramifications of waiving a jury trial—the concepts of trial by his peers, the requirement of unanimity, and his participation in the selection process. Therefore this Court must reverse his convictions and remand for a new trial.

CONCLUSION

For the reasons presented, appellant respectfully requests that this Court reverse his convictions and remand for a new trial.

Respectfully submitted,

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Ellen H. Flottman, MOBar #34664
Attorney for Appellant
3402 Buttonwood
Columbia, Missouri 65201-3724
Telephone: (573) 882-9855
FAX: (573) 875-2594
E-mail: Ellen.Flottman@mspd.mo.gov

Certificate of Compliance and Service

I, Ellen H. Flottman, hereby certify to the following. The attached brief complies with the limitations contained in Rule 84.06(b). The brief was completed using Microsoft Word, Office 2002, in Times New Roman size 13 point font. Excluding the cover page, the signature block, this certificate of compliance and service, and appendix, the brief contains 4,000 words, which does not exceed the 31,000 words allowed for an appellant's brief.

The floppy disk filed with this brief contains a complete copy of this brief. It has been scanned for viruses using a McAfee VirusScan program, which was updated in April, 2006. According to that program, the disks provided to this Court and to the Attorney General are virus-free.

Two true and correct copies of the attached brief and a floppy disk containing a copy of this brief were mailed, postage prepaid this 28th day of April, 2006, to Shaun Mackelprang, Chief Counsel, Criminal Appeals Division, P.O. Box 899, Jefferson City, Missouri, 65102.

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Ellen H. Flottman

APPENDIX

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